MR.
17-629

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 109.

AUGUSTUS SCHELL, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

W. E. DODGE, D. JAMES, D. W. JAMES, J. STOKES, AND W. E. DODGE, JR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between W. E. Dodge, D. James, D. W. James, J. Stokes, & W. E. Dodge, jr., plaintiffs, and Augustus Schell, defendant, a manifest error hath happened, to the great damage of the said Augustus Schell, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

SAML. BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-five, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Augustus Schell, plaintiff in error, against W. E. Dodge, D. James, D. W. James, J. Stokes, and W. E. Dodge, jr., defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) U. S. Supreme Court. Augustus Schell, plaintiff in error, against W. E. Dodge, D. James, D. W. James, J. Stokes, & W. E. Dodge, jr., defendants in error. Writ of error. Stewart L. Woodford, att'y for pl'ff in error. U. S. circuit court. Filed Jul. 30, 1878. John I. Davenport, clerk.

I hereby admit due service of a copy of the within.

MAY & PARSONS,
Att'y for Def't in Error.

JUL. 27, 1878.

3 Circuit court of the United States for the southern district of New York.

WILLIAM E. DODGE ET AL., PLAINTIFFS,
against
AUGUSTUS SCHELL, COLLECTOR OF THE PORT of New York, defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by Kaufmann, Frank & Wilcoxson, their attorneys, come here into court and suggest and give the court now here to understand and be informed that heretofore, to wit, on the 26th day of April, 1864, an action was commenced in the supreme court of the State of New York, in and for the city and county of New York, according to the laws of the State of New York and the rules and practice of said court in such case made and provided, in favor and in the name of
4 said plaintiffs against the defendant herein; upon and for the same cause of action hereinafter set forth; and the summons therein was filed in the office of the clerk of the city and county of New York, he being also the clerk of the supreme court, on the 26th day of April, 1864.

That the defendant afterwards, by E. Delafield Smith, esq., his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the 2d day of July, in the year of our Lord one thousand eight hundred and sixty-four, the said action was in due form of law removed, by writ of certiorari, for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said supreme court did thereupon return the said writ, with the summons aforesaid, and did file the same in this court according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but ad-
5 mits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs now, according to law, by their attorneys aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 26th day of April, 1864, at the city of New York, in the southern district of New York aforesaid, was indebted to the said plaintiff in the sum of eighteen hundred dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of the said defendant; and for other moneys by said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said de-
6 fendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs,

and then and there being in arrear and unpaid, and upon such accounting the said defend nt then and there was found to be in arrear and indebted to the plaintiffs in the further sum of eighteen hundred
7 dollars of lawful money as aforesaid; and being so found in arrears and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, &c.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs, eighteen hundred dollars.

And therefore the plaintiffs bring suit, &c.

8 And the said defendant, by D. S. Dickinson, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him; and of this he puts himself upon the country, &c.

Therefore, the issue above joined is ordered by the said court to be tried at a circuit court appointed to be held at the U. S. court rooms in the city of New York, on the 3d Monday of October, in the year 187 ; and now, at this day, to wit, the 20 day of January, 1877, being as yet of the said October term, 1877, before the said justices, at the U. S. court rooms in the said city of New York, came the said parties, by their attorneys aforesaid, and the said circuit judge, before whom the said issues were tried, hath sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within
9 contained, before Sam'l Blatchford, esq., judge of the said circuit court, come as well the within-named plaintiffs and the said defendants, by their respective attorneys within mentioned, and the jurors of the jury whereof mention is within made also come, who, to speak the truth in the matter within contained, being chosen, tried, and sworn upon their oaths, do say that the said defendant did undertake and promise, in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs by reason of the premises at the sum of seventeen thousand two hundred and fifty-seven $\frac{93}{100}$ dollars over and above their costs and charges by them about their suit in their behalf expended, and for these costs and charges the sum of two hundred and forty $\frac{97}{100}$ dollars.

17,257 93
240 97
17,498 90

Therefore it is considered that the said plaintiffs recover
10 against the said defendant their damages aforesaid, by the jurors aforesaid, in form aforesaid found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent; which said damages, costs, and charges, in the whole, amount to seventeen thousand four hundred and ninety-eight $\frac{90}{100}$ dollars.

Judgment signed this twentieth day of January, 1877.

J. M. DEUEL, *Dep'y Clerk.*

(Endorsed:) U. S. circuit court. W. E. Dodge & al. vs. Augustus Schell, collector of the port of New York. Judgment record. E. D. Smith, pl'ffs' att'y. Filed Jan'y 20, 1877.

11 U. S. circuit court, southern district of New York.

FEBRUARY 23, 1871.

W. E. DODGE ET ALS.
vs.
AUGUSTUS SCHELL.

E. Delafield Smith, pl'ffs' att'y.

On reading and filing the consent herein signed by Eugene H. Pomeroy, attorney for the plaintiffs in the above-entitled action, and on motion of Mr. E. Delafield Smith, it is ordered that E. Delafield Smith be substituted as attorney for the plaintiffs in the within-entitled action in the place and stead of Eugene M. Pomeroy.

(A copy from the book of Common Rules.)

12 United States circuit court, southern district of New York.

A.	1051.	E. H. Arnold	vs. Redfield,	1863,	M'ch	10..	1000
	1112.	A. Aldridge et al.	" Schell,	1863,	Ap.	6..	1000
	1119.	E. H. Arnold	" "	"	"	" ..	1000
	1218.	W. C. Atwood et al.	" "	"	May	11..	1000
	1222.	Jos. Albro et al.	" "	"	"	" ..	1000
	1604.	Nathan Asiel et al.	" Barney,	"	Nov.	18..	1900
	1747.	J. Acker et al.	" Redfield,	"	Dec.	4..	1900
	1826.	C. Andre et al.	" Schell,	"	Dec.	21..	1200
	1824.	Wm. Aufermann et al.	" "	"	"	" ..	1400
	2041.	Jno. Atwell	" "	1864,	Jan.	23..	1900
	1823.	Union Adams	" "	1863,	Dec.	21..	1000
	2061.	F. D. Allen et al.	" "	1864,	Feb.	2..	1800
	2183.	H. Ackermann	" Barney,	"	Feb.	18..	1500
	2184.	H. Ackermann et al.	" "	"	"	" ..	1500
	2266.	J. H. Adams	" Schell,	"	Feb.	23..	1000
	2886.	Ed. Armstrong	" Barney,	1865,	M'ch	1..	1550
	2546.	G. Albinola	" Schell,	1864,	Ap.	20..	1000
	2545.	J. Altman et al.	" "	"	"	18..	1200
	2104.	L. L. Arnold et al.	" "	"	Feb.	4..	1500
	2634.	F. H. Aschman et al.	" "	"	Apl.	28..	1550
B.	913.	A. T. Bruce et al.	" "	1862,	Dec.	2..	1500
	911.	J. Blumenthal et al.	" "	"	"	..	1000
	1214.	J. S. Billings et al.	" "	1863,	May	11..	1000
	1215.	W. Bliss et al.	" "	"	"	" ..	1000
	1833.	H. McBarklie et al.	" "	"	Dec.	21..	1000
	1831.	Richard Bell	v. Schell,	1863,	Dec.	21..	1200
	1799.	C. F. Blake	" "	"	Dec.	5..	1950
	1830.	J. Badnall et al.	" "	"	"	21..	1600

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	1961.	W. H. Beare et al.	" "	1864,	Jan.	19..	1800
	2058.	W. R. Babcock et al.	" "	"	"	23..	1900
	2043.	Harvey Bancroft et al.	" "	"	"	" ..	1900
	2051.	Jas. Black et al.	" "	"	"	" ..	1950
	2050.	M. Bliss et al.	" "	"	"	" ..	1950
	2191.	Aug. Bernstein	" Barney,	"	Feb.	18..	1500
	2159.	W. M. Bliss et al.	" Schell,	"	"	20..	1900
	2158.	H. Batjer	" "	"	"	" ..	1450
	2267.	E. A. Boyd	" "	"	"	23..	1000
	2547.	C. E. Bailliere	" "	"	Apl.	18..	1200
	2105.	L. Bamberger et al.	" "	"	Feb.	18..	1200
	2631.	N. Benziger et al.	" "	"	Ap.	28..	1550
	2532.	A. Bernstein et al.	" "	"	"	" ..	1500
	2108.	A. Blum	" "	"	Feb.	18..	1000
	2474.	A. Bondy	" "	"	M'ch	31..	1200
	2110.	J. Bondy et al.	" "	"	Feb.	18..	1500
	2109.	J. Bondy et als.	" "	"	"	" ..	1600
	2630.	J. H. Bosshard et al.	" "	"	Apl.	28..	1650
	2185.	S. S. Bauman et al.	" "	"	"	" ..	1300

	2488.	K. Boyce et al.	vs. Schell,	1864,	Apl. 1..	1980
	2489.	J. A. Bliss et al.	" "	"	" " ..	1980
	2633.	A. H. Drake et al.	" "	"	" 28..	1800
	2487.	A. F. Brandt	" "	"	" " ..	1000
	2106.	F. Brossard	" "	"	Feb. 18..	1000
	2472.	H. Brown, jr.	" "	"	M'ch 31..	1400
	2107.	W. K. Bruse	" "	"	Feb. 18..	1000
	2473.	F. H. Brown et al.	vs. Schell,	1864,	M'ch 31..	1500
C.	1582.	Jno. G. Crane et al.	" "	1863,	Nov. 11..	1800
	1802.	W. Clapp (Kent) et al.	" "	"	Dec. 5..	1900
	1801.	E. Cock et al.	" "	"	" " ..	1980
	1803.	W. Clapp (Beckley) et al.	" "	"	" " ..	1900
14						
	1800.	A. G. Crane et al	" "	"	" " ..	1950
	1861.	L. Cramer (Abegg) et al.	" "	"	" 31..	1000
	1862.	L. Cramer (McClosky) et al.	" "	"	" " ..	1000
	1965.	D. Carolin et al.	" "	1864,	Jan. 19..	1800
	1964.	W. J. Cunningham et al.	" "	"	" " ..	1950
	1963.	H. M. Crawford et al.	" "	"	" " ..	1900
	1962.	Henry Cohen	" "	"	" " ..	1900
	2053.	J. Clyde et al.	" "	"	Jan. 23..	1500
	2063.	Chas. E. Claghorn et al.	" "	"	Feb. 2..	1800
	2271.	E. Coleman et al.	" "	"	" 23..	1700
	2272.	J. Callender et al.	" "	"	" " ..	1400
	2270.	W. H. Churchill et al.	" "	"	" " ..	1800
	2269.	Jno. M. Coleman	" "	"	" " ..	1000
	2268.	J. E. Caldwell et al.	" "	"	" " ..	1600
	2625.	E. Caron et al.	" "	"	Ap'l 28..	1800
	2626.	C. Carville	" "	"	" " ..	1500
	2628.	E. Caylus et al.	" "	"	" " ..	1950
	2624.	W. Churchill, jr.	" "	"	" " ..	1500
	2623.	H. E. Clark et al.	" "	"	" " ..	1800
	2112.	S. B. Cohen et al.	" "	"	Feb. 18..	1400
	2114.	G. M. Cohen et al.	" "	"	" " ..	1600
	2113.	H. M. Cohen et al.	" "	"	" " ..	1800
	2629.	E. H. Conway et al.	" "	"	Ap. 28..	1500
	2111.	L. Cook et al.	" "	"	Feb. 18..	1500
	2627.	Jas. Cook et al.	vs. Schell,	1864,	Ap. 28..	1400
	1365.	Jno. Cropper et al.	" "	1863,	June 8..	500
	2548.	J. Crosby et al.	" "	1864,	Ap. 18..	1500
D.	1173.	J. H. Dulles, jr.,	" Barney,	1863,	May 1..	4000
	1633.	R. L. Dawson et al.	" Schell,	"	Nov. 27..	1900
	1866.	E. J. Donnell	" "	"	Dec. 31..	1500
	2037.	A. Dexter et al.	" "	1864,	Jan. 23..	1800
15						
	2040.	Jno. Doggett	" "	"	" " ..	1600
	2066.	Wm. Dickson	" "	"	Feb. 2..	1900
	2065.	R. T. Downie	" "	"	" " ..	1200
	2160.	Nath'l Dougherty	" "	"	" 20..	1900
	2161.	S. N. Dodge	" "	"	" " ..	1500
	2274.	J. H. Dulles, jr., et al.	" "	"	" 23..	1100
	2273.	Thad. Davids et al.	" "	"	" " ..	1200
	2305.	Sam'l Down	" "	"	" 26..	1500
	1028.	David H. Davis	" Redfield,	1863,	" 25..	1500
	2118.	J. A. Davenport	" Schell,	1864,	" 18..	1050
	2475.	F. de Bary	" "	"	M'ch 31..	1980
	2120.	H. R. Disseldorff et al.	" "	"	Feb. 18..	1600
	2117.	M. Ditman et al.	" "	"	" " ..	1800
	2116.	D. Dinkelspell et al.	" "	"	" " ..	1800
	2115.	W. A. Dodge	" "	"	" " ..	1100
	2549.	W. E. Dodge et al.	" "	"	Apr. " ..	1800
	2119.	A. Drey et al.	" "	"	Feb. " ..	1700
E.	921.	M. P. Emden et al.	" "	1862,	Dec. 2..	1000
	909.	A. T. Edgerton	" "	1863,	Feb. 6..	1500
	1109.	James Elliott	" "	"	Ap. 6..	1000
	1531.	G. H. Ellery et al.	" "	"	Oct. 22..	1700
	1867.	E. Elting et al.	" "	"	Dec. 31..	1800
	1928.	Thomas W. Evans et al.	v. Schell,	1864,	Jan. 9..	1800
	2275.	Chas. Ellis et al.	v. "	"	Feb. 23..	1000
	2122.	A. L. Eastman et al.	v. "	"	" 18..	1900

	2490.	L. Edgerton et al.	v.	Schell,	1864,	Ap. 1..	1600
	2744.	J. B. Elliman et al.	v.	"	"	" 18..	1400
	2121.	J. Emmanuel et al.	v.	"	"	Feb. " ..	1600
F.	1003.	Joseph E. Freund et al.	v.	"	1863,	Feb. 6..	1500
	1932.	Jno. A. Fischer et al.	"	"	1864,	Jan. 9..	1800
	1929.	Ed. Fort et al.	"	"	"	" " ..	1800
16							
	1966.	Jas. A. Farnum	"	"	"	" 19..	1900
	2046.	Jas. A. Farnum et al.	"	"	"	" 23..	1800
	1967.	Jas. French	"	"	"	" 19..	1600
	2196.	G. W. Faber	"	Barney,	"	Feb. 18..	1500
	2164.	R. Fischer et al.	"	Schell,	"	" 20..	1900
	2163.	Wm. Fisher	"	"	"	" " ..	1400
	2277.	Jos. S. Fisher	"	"	"	" 23..	1000
	2278.	B. H. Field	"	"	"	" " ..	1900
	2276.	W. Felt et al.	"	"	"	" " ..	1200
	2279.	C. J. Field et al.	"	"	"	" " ..	1200
	1033.	Chas. Francis	"	"	1863,	M'ch 4..	1500
	2133.	W. Fortenbach et al.	"	"	1864,	Feb. 18..	1800
	2476.	G. Fuerth et al.	"	"	"	M'ch 31..	1500
G.	907.	Simon Guitermann et al.	"	"	1862,	Dec. 2..	1000
	1031.	Chas. G. Grossmann et al.	"	"	1863,	M'ch 4..	1000
	1106.	Chas. G. Goodrich et al.	"	"	"	Ap. 6..	1000
	1565.	N. Guttmann et al.	"	"	"	Nov. 3..	1750
	1641.	J. S. Gillespie et al.	"	"	"	" 27..	1900
	1934.	Wm. Graydon et al.	"	"	1864,	Jan. 9..	1500
	2049.	E. Grundy et al.	vs.	Schell,	1864,	Jan. 23..	1900
	2048.	Chas. Gascoyne	"	"	"	" " ..	1900
	2056.	R. Guillon et al.	"	"	"	" " ..	1900
	2055.	J. W. Goff	"	"	"	" " ..	1900
	2039.	R. Gardner	"	"	"	" " ..	1900
	2042.	Wm. Grosholz	"	"	"	" " ..	1800
	2205.	Chas. Goedel	"	Barney,	"	Feb. 18..	1800
	2207.	Ernest Grieff	"	"	"	" " ..	1900
	2206.	Simon Guitermann et al.	"	"	"	" " ..	1800
	2280.	E. D. Goddard	v.	Schell,	"	" 23..	1300
	2124.	H. Goebler	v.	"	"	" 18..	1100
H.	822.	John S. Holden	v.	Redfied,	1862,	July 24..	1000
17							
	1001.	Thos. Hill et al.	v.	Schell,	1863,	Feb. 6..	1500
	996.	Geo. E. L. Hyatt	v.	"	"	" " ..	1500
	1117.	Jas. Houghton et al.	v.	"	"	Ap. 6..	1000
	1220.	R. Hawkins et al.	v.	"	"	May 11..	1000
	1542.	H. Hirschfelld et al.	v.	"	"	Oct. 24..	1000
	1545.	H. Hirschfeld et al.	v.	Barney,	"	" 24..	500
	1621.	G. Hessenberg et al.	v.	Schell,	"	Nov. 18..	1800
	1643.	M. A. Howell et al.	v.	"	"	" 27..	1800
	1728.	G. W. Hennings et al.	v.	"	"	Dec. 4..	1970
	1804.	W. C. Haggerty et al.	v.	"	"	" 5..	1970
	1939.	Jno. B. Hall	v.	"	1864,	Jan. 9..	1800
	1936.	A. & S. Henry	v.	"	"	" " ..	1800
	1938.	Sam'l Holmes et al.	v.	"	"	" " ..	1800
	2045.	C. G. Hurd et al.	v.	"	"	" 23..	1500
	2167.	Jno. M. Harper	v.	"	"	Feb. 20..	1200
	2282.	Thos. H. Heely	v.	"	"	" 23..	1050
	2285.	H. M. Hildeburn et al.	v.	"	"	" " ..	1150
	2283.	J. Hope et al.	vs.	Schell,	1864,	Feb. 23..	1000
	2284.	S. Hill	v.	"	"	" " ..	1000
	2286.	E. Haynes	v.	"	"	" " ..	1000
	2281.	W. Howard et al.	v.	"	"	" " ..	1250
	2745.	E. S. Halstead et al.	v.	"	"	Apl. 18..	1500
	2126.	J. Hamburger et al.	v.	"	"	Feb. " ..	1900
	2746.	J. P. Hammill	v.	"	"	Apl. " ..	1000
	2133.	C. C. Hatch et al.	v.	"	"	Feb. " ..	1200
	2125.	D. Haussmann et al.	v.	"	"	" " ..	1800
	2132.	P. M. Haverty	v.	"	"	" " ..	1000
	2748.	D. G. Haviland et al.	v.	"	"	Apl. " ..	1900
	2131.	F. G. Hendrick et al.	v.	"	"	Feb. " ..	1800
	1366.	F. Hernsley et al.	v.	"	1863,	June 8..	500
	2747.	E. Herfurth	v.	"	1864,	Ap. 18..	1000

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	2127.	E. Herman et al.	v.	Schell,	1864, Feb.	18..	1800
	2129.	M. Hermann et al.	v.	"	" "	"..	1400
	2491.	A. Higgins et al.	v.	"	" Ap.	1..	1700
	2130.	N. Hillyer	v.	"	" Feb.	18..	1600
	2128.	M. Hollacher	v.	"	" "	"..	1000
I.	1968.	I. S. Inloes et al.	v.	"	" Jan.	19..	1800
	2287.	F. Ingoldsby et al.	v.	"	" Feb.	23..	1500
J.	1731.	John C. Jackson	v.	"	1863, Dec.	4..	1800
	1805.	Geo. Johnson et al.	v.	"	" "	5..	1900
	1940.	H. P. Journeay et al.	v.	"	1864, Jan.	9..	1600
	2068.	F. M. Jones et al.	"	"	" Feb.	2..	1900
	2169.	E. H. Jacot	"	"	" "	20..	1800
	2288.	A. B. Justice et al.	"	"	" "	23..	1450
	2134.	H. Jacoby et al.	"	"	" "	18..	1800
	2456.	S. Jacobi	vs.	Schell,	1864, Mch.	31..	1300
	2749.	E. A. Jee et al.	v.	"	" Ap.	18..	1800
K.	1005.	J. C. Kilgour et al.	v.	"	1863, Feb.	6..	1000
	1969.	F. V. King et al.	v.	"	1864, Jan.	19..	1800
	2289.	A. Kamak	v.	"	" Feb.	23..	1500
	2170.	Chas. Kentgen	v.	"	" "	20..	1500
	2290.	H. Kellogg et al.	v.	"	" "	23..	1550
	2750.	Geo. E. Kunhardt	v.	"	" Ap.	26..	1800
L.	1216.	F. Lee et al.	v.	"	1863, May	11..	1000
	1213.	A. J. Lewis et al.	v.	"	" "	"..	1000
	1212.	S. Leonard et al.	v.	"	" "	"..	1000
	1972.	H. M. Laing et al.	v.	"	1864, Jan.	19..	1800
	1944.	Henry Levy	v.	"	" "	9..	1800
	1971.	N. Loder et al.	v.	"	" "	19..	1900
	1970.	J. D. Lewis et al.	v.	"	" "	"..	1900
	2136.	A. Ladewig et al.	v.	"	" Feb.	18..	1800
	2480.	C. G. Lauden et al.	v.	"	" Ap.	1..	....

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	2478	W. G. Lave et al.	v.	"	" "	"..	1980
	2457.	W. Larome	v.	"	" Mch.	31..	1800
	2751.	E. Lebrun et al.	v.	"	" Ap.	18..	1600
	2135.	T. H. Leggett, jr., et al.	v.	"	" Feb.	18..	1800
	2477.	E. Lentilhou	v.	"	" Mch.	31..	1900
	2481.	A. Lein et al.	v.	"	" Ap.	1..	1800
M.	923.	F. M. Maas et al.	v.	"	1862, Dec.	2..	1500
	1104.	Jno. A. Murphy et al.	v.	"	1863, Ap.	6..	1000
	1585.	C. Meletta	v.	"	" Nov.	11..	1900
	1606.	H. Moulun	v.	Barney,	" "	18..	1500
	1626.	C. Meletta et al.	v.	Schell,	" "	11..	1800
	1735.	E. E. Morgan	v.	"	" Dec.	4..	1900
	1810.	Jno. Morrison	vs.	Schell,	1863, Dec.	5..	1800
	1811.	W. Morrison et al.	v.	"	" "	"..	1900
	1947.	L. Marx et al.	v.	"	1864, Jan.	9..	1800
	2057.	C. C. Merchant et al.	v.	"	" "	23..	1800
	2071.	T. Mellor et al.	v.	"	" Feb.	2..	1800
	2070.	H. Mauperin et al.	v.	"	" "	"..	1500
	2173.	E. Mills	v.	"	" "	20..	1600
	2291.	T. Mendel et al.	v.	"	" "	23..	1500
	2292.	J. A. McAllister et al.	v.	"	" "	"..	1400
	2885.	Thos. Monroe et al.	v.	"	1865, Feb.	25..	1450
	2172.	M. H. Maas et al.	v.	"	1864, "	20..	1800
	2459.	H. Machen	v.	"	" Mch.	31..	1600
	2752.	W. H. Martin et al.	v.	"	" Ap.	18..	1100
	2137.	J. Masson et al.	v.	"	" Feb.	18..	1700
	2753.	M. F. Merritt	v.	"	" Ap.	18..	1000
	2754.	R. S. Middleton et al.	v.	"	" "	"..	1000
	2479.	A. M. Morgan et al.	v.	"	" "	1..	1600
	2755.	E. Mygatt et al.	v.	"	" "	18..	1800
N.	2138.	J. Newberger	v.	"	" Feb.	18..	1600

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O.	1113.	M. Oppenheimer et al.	v.	"	1863, Ap.	6..	1000
	2139.	J. N. Oettinger et al.	v.	"	1864, Feb.	18..	1500
	2140.	M. Ohlmann et al.	v.	"	" "	"..	1600

P.	1118.	Benj'n Pike et al.	v. Schell,	1863,	Ap.	6..	1000
	1116.	A. Plimpton et al.	v. "	"	"	" ..	1000
	1219.	E. W. Payne	v. "	"	May	11..	1000
	1583.	E. Poirier et al.	v. "	"	Nov.	11..	1500
	1638.	T. Paton et al.	v. "	"	"	27..	1900
	1812.	F. T. Peet et al.	v. "	"	Dec.	5..	1900
	1975.	Geo. D. Parrish	vs. Schell,	1864,	Jan.	19..	1800
	2222.	Henry Pastor et al.	vs. Barney,	"	Feb.	18..	1600
	1974.	E. W. Payne	vs. Schell,	"	Jan.	19..	1800
	2174.	G. A. Poppe et al.	vs. "	"	Feb.	20..	1750
	2293.	C. J. Price et al.	vs. "	"	"	23..	1100
	1026.	S. H. Pearce et al.	vs. Redfield,	1863,	Feb.	25..	1500
	1977.	do " "	vs. Schell,	1864,	Jan.	19..	1800
	2482.	I. I. Phelps et al.	v. "	"	Ap.	1..	....
	2464.	M. W. Phineas	v. "	"	M'ch	31..	1700
	2141.	I. Pollack et al.	v. "	"	Feb.	18..	1700
	2458.	M. Pollitzer	v. "	"	M'ch	31..	1800
R.	1000.	C. Robbins et al.	v. "	1863,	Feb.	6..	1500
	1108.	A. H. Rosenheim et al.	v. "	"	Ap'l	6..	1000
	1578.	Geo. Rogge	v. "	"	Nov.	11..	1800
	1736.	F. W. Reimer et al.	v. "	"	Dec.	4..	1950
	1979.	E. Robins et al.	v. "	1864,	Jan.	19..	1500
	1980.	G. B. Reese et al.	v. "	"	"	" ..	1600
	2047.	A. G. Renault	v. "	"	"	23..	1800
	2072.	W. Raphael	v. "	"	Feb.	2..	1800
	2073.	W. P. Reeder	v. "	"	"	" ..	1800
	2175.	John Ryle	v. "	"	"	20..	1500
	2757.	W. Rimmer et al.	v. "	"	Apl.	18..	1300
21							
	2143.	J. Rau et al.	v. "	"	Feb.	18..	1300
	2142.	T. Rose et al.	v. "	"	"	" ..	1500
	2756.	J. T. Robin	v. "	"	Ap.	18..	1200
S.	1002.	P. F. Smith	v. "	1863,	Feb.	3..	1900
	1120.	J. Schaffner	v. "	"	Ap.	6..	1000
	1591.	A. Schniewind et al.	v. "	"	Nov.	11..	1500
	1741.	W. Smith et al.	v. "	"	Dec.	4..	1900
	1813.	A. Smith et al.	v. Schell,	1863,	Dec.	3..	1900
	1995.	J. Seligman et al.	v. "	1864,	Jan.	19..	1850
	1987.	P. Sieger et al.	v. "	"	"	" ..	1800
	1986.	J. B. Sheppard et al.	v. "	"	"	" ..	1800
	1985.	David Samuel et al.	v. "	"	"	" ..	1200
	1993.	Benj'n Sharp	v. "	"	"	" ..	1800
	2075.	R. J. Scrivener	v. "	"	Feb.	2..	1600
	2076.	Pliny F. Smith et al.	v. "	"	"	" ..	1900
	2078.	A. Stephani	v. "	"	"	" ..	1600
	2232.	R. A. Schnabel et al.	v. Barney,	"	"	18..	1800
	2228.	H. Schorndorff et al.	v. "	"	"	" ..	1800
	2230.	L. Struller et al.	v. "	"	"	" ..	1600
	2231.	John Sattig	v. "	"	"	" ..	1600
	2178.	F. S. Schlessinger et al.	v. Schell,	"	"	20..	1600
	2294.	S. Sheldon et al.	v. "	"	"	23..	1800
	2295.	M. H. Swift et al.	v. "	"	"	" ..	1700
	2298.	B. E. Staats	v. "	"	"	" ..	1200
	2890.	Theo. Strang et al.	v. "	1865,	June	13..	1980
	2893.	Same	v. Barney,	"	Aug.	1..	1950
	2760.	G. G. Sampson et al.	v. Schell,	1864,	Ap.	20..	1980
	2460.	G. Sanderson	v. "	"	Mch.	31..	1800
	2463.	G. Scheupenhausen et al.	v. "	"	"	" ..	....
	2762.	H. Schlesinger et al.	v. "	"	Ap.	18..	1300
	2145.	A. Scholle et al.	v. "	"	Feb.	" ..	1600
22							
	2461.	H. Schulting	v. "	"	M'ch	31..	1700
	2147.	L. Stine et al.	v. "	"	Feb.	18..	1400
	2146.	J. Straup et al.	v. "	"	"	" ..	1700
	2142.	S. H. Strouse et al.	v. "	"	"	" ..	1600
	2758.	G. G. Smith et al.	v. "	"	Ap.	" ..	1850
	2465.	L. Sombour	vs. Schell,	1864,	M'ch	31..	1500
	2759.	E. Sourbet	vs. "	"	Ap.	18..	1060
T.	919.	C. A. Townsend et al.	" "	1862,	Dec.	2..	1500
	1111.	J. Thomas	" "	1863,	Ap.	6..	1000

	1231.	J. Thomas	vs. Redfield,	1863, May	15..	1000
	1957.	Holbert Taylor	vs. "	" Nov.	27..	1900
	1742.	Same	vs. Schell,	" Dec.	4..	1900
	1816.	G. Tingle et al.	" "	" "	5..	1980
	1817.	W. Taylor et al.	" "	" "	5..	1900
	1996.	E. W. Tryon et al.	" "	1864, Jan.	19..	1900
	2235.	Holbert Taylor	vs. Barney,	" Feb.	18..	1600
	2471.	C. F. Tag	v. Schell,	" M'ch	31..	1500
	2148.	E. T. Tefft et al.	v. "	" Feb.	18..	1800
	2149.	W. H. Thorne et al.	v. "	" "	"	1800
	2470.	E. M. Townsend	v. "	" M'ch	31..	1500
	2483.	G. W. Tuttle	v. "	" "	"	1500
U.	1562.	J. A. Ubsdell et al.	v. "	1863, Nov.	3..	1700
	2236.	E. D. Unkart	v. Barney,	1864, Feb.	18..	1700
	2237.	Same et al.	v. do	" "	"	1700
V.	1217.	J. Valerio et al.	v. Schell,	1863, May	11..	1000
	2761.	Michael Victory	v. "	1864, Ap.	26..	1500
W.	914.	M. Westheim	v. "	1862, Dec.	2..	1000
	924.	W. W. Wright et al.	v. "	" "	"	1000
	1115.	S. Wilder et al.	v. "	1863, Ap.	6..	1000
	1581.	L. Wetzlar et al.	v. "	" Nov.	11..	1400
	1586.	W. Wallach	v. "	" "	"	1500
23						
	1589.	W'm M. Waterbury	v. "	" "	"	1400
	1997.	W'm Wiese	v. "	1864, Jan.	19..	1600
	2000.	Richard Wood et al.	v. "	" "	"	1800
	1999.	W'm Warnock	vs. Schell,	1864, Jan.	19..	1800
	1998.	A. Worrell et al.	v. "	" "	"	1800
	2302.	S. S. Wood et al.	v. "	" Feb.	23..	1300
	2079.	P. Wright et al.	v. "	" "	2..	1900
	2242.	M. C. G. Witte	v. Barney,	" "	18..	1200
	2243.	Jno. G. Witte	v. "	" "	"	1200
	2180.	W. N. Woodcock	v. Schell,	" "	20..	1800
	2303.	W. P. Wilstach et al.	v. "	" "	23..	1000
	2301.	J. M. Warren et al.	v. "	" "	"	1900
	2300.	E. Willets	v. "	" "	"	1600
	2059.	Ed. Wood	v. "	" Jan.	"	1500
	2151.	L. Wachenheim et al.	v. "	" Feb.	18..	1700
	2466.	A. Wallach	v. "	" M'ch	31..	1500
	2763.	W'm Walton et al.	v. "	" Ap.	18..	1500
	2764.	H. W. Warner et al.	v. "	" "	"	1200
	2765.	H. D. Weed et al.	v. "	" "	"	1800
	2154.	B. Weisker et al.	v. "	" Feb.	18..	1400
	2152.	J. Wetzlar et al.	v. "	" "	"	1400
	2469.	L. Wetzlar	v. "	" "	"	1500
	2468.	S. P. Windmuller	v. "	" M'ch	31..	1500
	2485.	G. B. Windle et al.	v. "	" Ap.	1..	1000
	2155.	P. W. Wiskemann et al.	v. "	" Feb.	18..	1800
	2153.	H. Wolff et al.	v. "	" "	"	1500
	2467.	R. Wolff et al.	v. "	" M'ch	31..	1300
	2484.	J. W. Wood et al.	v. "	" Ap.	1..	1700
Y.	2080.	E. M. Young et al.	v. "	" Feb.	2..	1800
Z.	2156.	S. Zinn et al.	v. "	" "	18..	1600

24 U. S. circuit court, southern district of New York.

It is stipulated and agreed that the order hereto annexed be entered by and with the consent and direction of the court in each of the above entitled causes, and that upon the entry of such order the said several causes stand referred to John I. Davenport, esq., for the purposes and in the manner specified in said order.

Dated January 19, 1875.

E. DELAFIELD SMITH,
Attorney for the plaintiffs in each of said causes.
GEORGE BLISS,
Attorney for the defendants in each of said causes.

On reading and filing the stipulation on behalf of the respective parties to the above entitled actions now pending in this court to recover duties alleged to have been illegally exacted upon charges and commissions, it appearing to the court that the assessment of the damages in each of the said several causes will require the examination of long accounts and of numerous invoices, entries, and other documents
25 and the papers, and the taking of the testimony of various witnesses touching the same:

Now, on motion of E. Delafield Smith, of counsel for the said several plaintiffs, George Bliss, esq., counsel for said several defendants, appearing and not objecting thereto, it is ordered by the said court now here that the said several causes be, and the same are hereby, referred to John I. Davenport, esq., as sole referee to take proofs of and ascertain the claims of the plaintiff or plaintiffs in each of the said several causes with interest, for excess of duties upon such charges and commissions which may be found to have been illegally exacted from plaintiffs, and paid under protest to defendants, and not barred by the statute of limitations whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served or to be served in said several causes.

The said referee shall proceed to determine and adjust the claims of the said several plaintiffs in accordance with the rules and decis-
26 ions of this court in similar cases so far as the same shall be found applicable to the said causes hereinabove named.

And it is further ordered that said referee state and report the amounts ascertained by him on said several commissions and charges separately and the facts found by him in respect thereto, and in respect to the protests touching the same.

The said referee shall give notice to the attornies of the respective parties of the time and place of hearing therein, unless such notice shall be waived by said attornies and that either party may on the hearing before said referee raise objections and exceptions, and the referee shall decide thereon and either party may bring such objections and exceptions to a hearing before the court after the report of said referee shall be filed and for that purpose may require the referee to report the evidence or testimony taken in the case upon which the objection or exception arises in such manner as the court shall direct, and copies of the protests filed therein respectively.

27 The said referee shall report on such cases with all convenient dispatch, and on the coming in of said report, and the decision of such exceptions as may be taken thereto by either party, either party shall be at liberty to move for judgment or verdict for the amount as to the court shall seem meet.

And it is further ordered that the compensation of said referee shall be determined by the court after the coming in of his said report at such amount as shall appear to such court to be just and proper.

(Signed) SAM'L BLATCHFORD.

Endorsed: U. S. circuit court. E. H. Arnold et als. vs. Heman J. Redfield and other similar causes. Stipulation and order of reference. E. Dalafield Smith, pl'ffs' att'y. Filed March 13, 1875.

28 Circuit court of the United States for the southern district of New York.

WM. E. DODGE ET AL.
vs.
AUGUSTUS SCHELL.

In pursuance of an order made in the above-entitled cause on the 13 day of March, in the year of our Lord one thousand eight hundred and seventy-five, by which, among other things, it was referred to the undersigned to adjust the amount for which the plaintiffs are entitled to a verdict in this cause, and to report thereon to this court with all convenient speed.

Now, I, John I. Davenport, to whom the matter was referred, do report that I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in sup-
29 port of the plaintiffs' claim, and do find that the plaintiffs are entitled to a verdict for seventy-six hundred and ninety-six $\frac{10}{100}$ dollars, and the interest on said sum, from the date of its payment to defendants to the date of this report, amounting to ninety-five hundred and sixty-one $\frac{83}{100}$ dollars, in the aggregate amounting to the sum of seventeen thousand two hundred and fifty-seven $\frac{93}{100}$ dollars, $17,257.93.

All of which is respectfully submitted.

Dated the twentieth day of January, A. D. 1877.

JOHN I. DAVENPORT,
Referee.

E. DELAFIELD SMITH,
Attorney for Plaintiffs.

$198.

30 (Endorsed:) U. S. circuit court, southern district of New York. W. E. Dodge et al. vs. Augustus Schell. Report of referee. Filed Jan'y 20, 1877.

31 United States circuit court, southern district of New York.

H. ACKERMAN *vs.* HIRAM BARNEY.
W. D. CROMWELL ET AL. *vs.* THE SAME.
GEORGE BLISS ET AL. *vs.* AUG. SCHELL.
THOS. DREW ET AL. *vs.* H. J. REDFIELD.
J. ACKER ET AL. *vs.* THE SAME.
H. HENSCHEN ET AL. *vs.* AUGUSTUS SCHELL.
AUG. AYMAR ET AL. *vs.* H. J. REDFIELD.
F. DU BARRY *vs.* AUG. SCHELL.
J. H. DULLES, JR., ET AL. *vs.* THE SAME.
W. E. DODGE ET AL. *vs.* AUGUSTUS SCHELL.
WM. H. LEE ET AL. *vs.* THE SAME.
E. UNKART ET AL. *vs.* HIRAM BARNEY.
J. HOULDSWORTH ET AL. *vs.* THE SAME.

32 The respective parties in each of the above causes hereby stipulate and agree to waive a jury and submit the questions of law and fact to be passed upon by the court without a jury.

Dated Jan'y 20, 1877.

E. DELAFIELD SMITH,
Pl'ff's' Att'y.
GEORGE BLISS, *Def't's Att'y.*

I find for the plaintiffs in each of the above causes as follows:

In the case of H. Ackermann vs. Barney, for nine hundred and eighty-two $\frac{85}{100}$ dollars.

In the case of Thos. Drew et al. vs. Schell, for eleven hundred and nine $\frac{07}{100}$ dollars.

In the case of F. du Bary vs. Schell, for four hundred and twenty-eight $\frac{80}{100}$ dollars.

In the case of W. H. Lee et al. vs. Redfield, for sixty-three hundred and forty-seven $\frac{41}{100}$ dollars.

In the case of W. D. Cromwell et al. vs. Schell, for ten hundred and forty $\frac{89}{100}$ dollars.

In the case of J. Acker et al. vs. Redfield, for eighty-six hundred $\frac{24}{100}$ dollars.

33 In the case of J. H. Dulles, jr., et al. vs. Schell, for one hundred and seventy-eight $\frac{20}{100}$ dollars.

In the case of E. Unkart et al. vs. Barney, for eleven hundred and eight $\frac{56}{100}$ dollars.

In the case of Aug. Aymer et als. vs. Redfield, for twenty-nine hundred and eighty-nine $\frac{50}{100}$ dollars.

In the case of George Bliss et al. vs. Schell, for twelve thousand two hundred and sixty-two $\frac{63}{100}$ dollars.

In the case of H. Henschen et al. vs. Schell, for twenty-one hundred and fifty-five $\frac{65}{100}$ dollars.

In the case of W. E. Dodge et al. vs. Schell, for seventeen thousand two hundred and fifty-seven $\frac{93}{100}$ dollars.

In the case of J. Houldsworth et al. vs. Schell, for five hundred and ninety-three $\frac{95}{100}$ dollars—as set forth in the reports of John I. Davenport, esqr., referee, dated Oct. 31, 1876, Nov. 30, 1876, January 19, 1877, and January 20, 1877.

(Signed) SAM'L BLATCHFORD.

34 UNITED STATES OF AMERICA, *ss:*

To W. E. Dodge, D. James, D. W. James, J. Stokes, & W. E. Dodge, jr., and their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Augustus Schell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated July 25, 1878.

SAM'L BLATCHFORD.

35 (Indorsed:) C. & C. 646. O. S. 2549. U. S. Supreme Court. Augustus Schell, plaintiff in error, against W. E. Dodge, D. James D. W. James, J. Stokes, & W. E. Dodge, jr., defendants in error. Citation. Stewart L. Woodford, att'y for pl'ff in error. Original citation & writ of error. Filed July 30, '78. P. U. S. circuit court. Filed Jul. 30, 1878. John I. Davenport, clerk.

Service of a copy of the within is hereby admitted, New York, July 29th, 1878.

MAY & PARSONS,
Att'ys for Def't in Error.

(Indorsement on cover:) No. 109. Augustus Schell, late collector, &c., plaintiff in error vs. W. E. Dodge, D. James, D. W. James, J. Stokes, & W. E. Dodge, jr. S. New York, C. C. U. S. Filed 2nd December, 1878.

17-629

OFFICE SUPREME COURT U. S.
FILED
OCT 10 1881
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1881.

SCHELL, LATE COLLECTOR, &C., *v.* DODGE AND OTHERS. } No. 109.

BRIEF FOR THE PLAINTIFF IN ERROR.

This was an action of *assumpsit* brought in April, 1864, to recover duties exacted upon *charges and commissions; damages*, $1,800, plea, *general issue.* Folios 3, 7, and 8.

Reference, March, 1875. Folio 24.

Report, January, 1877. Folio 28.

Verdict, $17,257.93. Folio 33.

Judgment, January, 1877, including costs, $17,498.90 Folio 9.

For *error* is assigned, *That the verdict and judgment are for an amount in excess of the damages claimed in the declaration.*

See Cox *v.* The United States (6 Peters, 172); Tidd, pp. 896, and the New York cases, Curtiss *v.* Lawrence (17 Johns., 110); Dox *v.* Dey (3 Wend., 356); Corning *v.* Corning (2 Selden, 97); Coulter *v.* Express Co. (5 Lansing, 67); Bowman *v.* Earle (3 Duer, 691); McIntyre *v.* Clark (7 Wend., 330).

S. F. PHILLIPS,
Solicitor-General.

Wm. J. Read, Law and Job 116 Printer, Fulton St., 1

The amount rel
in dispute
JAMES A.

—IN THE—

Supreme Court of the United States.

AUGUSTUS SCHELL,
Plaintiff in Error,
against
WILLIAM E. DODGE, and others,
Defendants in Error.

THE HON. THE ATTORNEY-GENERAL :

Dear Sir—You will please to take notice that upon the argument of the appeal in this cause we shall move the Court to make part of the record the statement referred to in the accompanying affidavits, or such particulars in reference thereto as will show that the amount as reported by the Referee was approved by the plaintiff in error. And that the defendants in error may have such other and further relief in the premises as to the Court may seem just and proper.

Dated, New York, Nov. 15, 1881.

Yours, &c.,
MAN & PARSONS,
Attys for Deft's in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

AUGUSTUS SCHELL,
Plaintiff in Error.
against
WILLIAM E. DODGE, and others,
Defendants in Error.

Southern District of New York, ss :

WILLIAM B. COUGHTRY being duly sworn deposes and says:

I was associated with E. Delafield Smith, Esq., the Attorney for the defendants in error, when this cause was heard before the Referee and judgment was entered in the Circuit Court.

The amount reported by the Referee appeared by a written statement in detail, showing the date of entry, the name of the vessel, where from, on what the duty was exacted, the dutiable value, the rate, the duty, the amount, the date of payment and the amount of interest. This was previously submitted to the United States District Attorney, and according to my best recollection and belief was marked approved by him. That statement, as I am informed and believe, is now in the possession of the Secretary of the Treasury at Washington. The amount reported by the Referee corresponded with that statement.

W. B. COUGHTRY.

Sworn, before me, this 16th day of November, 1881,

ALRICK H. MAN,
Notary Public, (72)
New York County.

[L.S.]

IN THE SUPREME COURT OF THE UNITED STATES.

AUGUSTUS SCHELL,
Plaintiff in Error.
against
WILLIAM E. DODGE, and others,
Defendants in Error.

Southern District of New York, ss :

JOHN E. PARSONS being duly sworn deposes and says:

I am of counsel for the defendants in error in this cause, and since the death of E. Delafield Smith, Esq., have had charge of the cause for them.

For the first time yesterday I learned, that it was proposed by the plaintiff in error to object upon the argument of the writ of error herein that the amount of the judgment was in excess of the *ad damnum*.

I did not represent the defendants in error at the time of the hearing. I first was informed to day by Mr. Coughtry that the report of Referee Davenport proceeded upon a statement of amount approved by the District Attorney as stated by Mr. Coughtry in his affidavit.

JNO. E. PARSONS.

Sworn before me, this 15th day of November, 1881,

CHAS. H. DILLEY,
Notary Public, (23)
New York County.

[L.S.]

Wm. J. Read, Law and Job 116 Printer, Fulton

The practice required

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1881.

Augustus Schell, late Collector, &c., *Plaintiff in Error,* *against* William E. Dodge, *et. al.,* *Defendants in Error.*	No. 109. Brief for defendants in error.

The defendants in error (plaintiffs below) sued to recover an excess of duties upon charges and commissions claimed to have been illegally exacted from them by the plaintiff in error (the defendant below) as collector of the port of New York, and claimed to have been paid under protest.

The action was commenced in the Supreme Court, of the State New York, on April 26, 1864, and was removed on July 2, 1864, to the United States Circuit Court for the Southern District of New York

On January 19, 1875, the United States District Attorney, representing the plaintiff in error, and the attorney for the defendants in error in this, and a large number of other actions, consented to an order by which it was referred to John I Davenport as Referee to take proof of and ascertain the claims of the plaintiffs in each of the actions with interest "for excess of duties upon such charges and commissions which may be found to have been illegally exacted from plaintiffs and paid under protest to defendant, and not barred by the Statute of Limitations whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served or to be served in said several causes."

The Referee was required to adjust the claims of the several plaintiffs, and to state and report the amounts ascertained by him.

The order provided that either party might on the hearing before the Referee raise objections and exceptions, that the Referee should decide thereon, and that either party might bring the objections and exceptions to a hearing before the Court after the report of the Referee should be filed.

The order further provided that on the coming in of the report and the decision of such exceptions as might be taken thereto by either party, either party should be at liberty to move for judgment or verdict for the amount as to the Court should seem meet.

Vide Stipulation, fol. 24, and order, fols. 25 to 27.

On January 20, 1877, the Referee reported that he had taken and examined the testimony in support of the plaintiff's claim, and found that they were entitled to a verdict for $7,696.10-100 principal and $9,561.83-100 interest—together $17,257.93.

On the same day, January 20, 1877, the several parties agreed to waive a jury and submit the questions of law and fact to be passed upon by the Court without a jury (fol. 32).

The Court found for the plaintiffs for the amount reported by the Referee. Judgment was entered accordingly, and the defendant took a writ of error.

The declaration contained two counts, the first demanding $1,800; and the second the further sum of $1,800.

It is understood that the plaintiff in error intends to claim that the judgment could not be regularly entered for an amount in excess of the *ad damnum* of the declaration with interest.

First.—As a general proposition it may be conceded that where *a jury* have rendered *a verdict* for an amount in excess of the claim in the declaration, judgment can only be entered for the amount claimed. The plaintiff may either remit the excess; or waive the verdict, amend his declaration, and take a new trial. The declaration cannot be amended after the verdict by increasing the *ad damnum*.

Cox *v* The United States, 6 Peters, 172.
Curtiss *v.* Lawrence, 17 Johns., 110.
McIntire *v.* Clark, 7 Wend., 330.
Corning *v.* Corning, 2 Seld. (N. Y. Court of Appeals), 97.

In the case last cited the Court say: "Before the adoption of the Code it was well settled that the Supreme Court had no power to allow an amendment of a declaration after verdict by increasing the amount of the damages claimed, to correspond with the amount of the verdict; except upon the condition that the plaintiff relinquished the verdict, paid the defendants' costs of the trial, and consented to a new trial (Dix *v.* Dey, 3 Wend., 356; Curtiss *v.* Lawrence, 17 Johns., 111).

"The Code has not changed this rule.

"These cases also show that the plaintiff had a right to enter a remititur for the excess of damages found by the jury over and above the amount claimed by the complaint and to enter a judgment for the amount so claimed."

Second.—This case was quite different. There was no verdict, no trial by a jury. The parties consented to a general reference to a Referee to *ascertain the amount illegally exacted from the plaintiffs upon the importations specified in the bill of particulars.* The Referee reported accordingly; and without complaint or exception—without a question raised by the defendant—the Circuit Judge was permitted to consider the case and make his decision.

If the defendant intended to avail of an objection so purely technical, for the matter of that, of any objection to the Referee's report, he should have brought it to the attention of the Court by objection and exception.

The stipulation and order of reference required this. The practice required it.

Story *v.* Livingston, 13 Peters, 359.
Heckers *v.* Fowler, 2 Wallace, 123, 131.
McPherson *v.* Cheadell, 24 Wend., 15.

In the last case the New York Supreme Court (COWEN, J.), said:

That where any question presented by the report of a Referee was to be reviewed "it must appear that the Court below, not merely the Referee, but the Court itself, has passed upon the question sought to be raised here."

Vide also Ketcham *v.* Clark, 22 Barb., 319, 320.
Bank of Monroe *v.* Widner, 11 Paige, 529, 533.

The question now raised appeared when the Referee's report was submitted to the Circuit Judge as the ground for his decision. If objection had then been taken by the plaintiff in error the declaration would have been amended and the decision would have been within the *ad damnum*. On all principles applicable to appeals and writs of error the plaintiff in error must be deemed to have waived any such objection.

Railroad Co. v. Lindsay, 4 Wallace, 650, 656.
Brockett v. Brockett, 3 How., 691, 692.
Doe v. Watson, 8 How., 263, 272.

There can be no new trial unless for error on the part of the Circuit Judge, and how can it be claimed that he committed error when the point could be, but was not made before him!

As soon as the principle of law was decided in the plaintiffs' favor all that remained was a book-keeping calculation to fix the amount, a calculation in practice ordinarily made by the subordinates of the Collector, and approved by the parties.

The plaintiff in error has not seen fit to bring up the evidence before the Referee. The Court is required to assume that it established the right of the plaintiffs below, to the amount reported in their favor, and that the plaintiff in error assented, he having made no objection and taken no exception as required by the order of reference and the practice.

Bell v. Brnen, 1 How., 169, 187.
The Ship Virgin, 8. Peters, 538, 550.
McMicken v. Perin, 18 How., 507, 510.

THIRD.—The only reason for the rule, applicable only to the verdict of a jury, that a verdict for an amount in excess of the *ad damnum* cannot be sustained, is that the defendant may be assumed not to have contested the question of amount, being satisfied, if held liable, with the limited claim as stated by the plaintiff

If the question arose here upon the verdict of a jury no such reason would apply.

The defendant was apprised by the bill of particulars what were the importations upon which duties were claimed to have been illegally exacted.

The Referee by his report in which the plaintiff in error acquiesced, found that upon such importations there had been exacted excessive duties to the amount which was adjudged in the plaintiffs favor by the Circuit Judge. It was for this amount that judgment was asked.

The plaintiff can not complain. He was thoroughly admonished before the hearing of the amount of the plaintiff's claim, and he made no demur.

The stipulation referring the action to Referee Davenport, and the bill of particulars must be treated as having enlarged the claim of the plaintiffs so as *to cover the amount illegally exacted upon the importations* specified.

It is that amount which the Circuit Judge decided that the plaintiffs were entitled to recover.

The plaintiff in error has not brought up the bill of particulars. It was before the Referee and the Circuit Judge. How can error be pleaded if the decision were within the bill of particulars? It was the illegal duty exacted upon the importations there specified, which the stipulation of the parties required the Referee to report, and for which they had in effect agreed that judgment should be taken.

Error is not to be assumed. On the contrary, everything is to be assumed in favor of the decision. In the absence of the bill of particulars, for example, the Court must assume that it gave to the plaintiff in error all requisite information of the amount of the plaintiffs' claim. And the plaintiff in error having made no objection the Court must further assume that he was satisfied of the right of the plaintiffs (the defendants in error) to a decision for the amount reported.

FOURTH.—Manifest justice requires that the judgment shall be affirmed.

The decision was in January, 1877. Neither at the hearing nor subsequent to the decision was any objection or exception taken by the plaintiff in error.

If taken at the hearing it would have been the duty of the Circuit Judge to grant such an amendment as would have permitted the plaintiffs to recover what was legally due. If taken afterwards the plaintiffs, if so advised, might have vacated their judgment, obtained any needed amendment and then brought the case to a second hearing on the Referee's report. Either course would have set at rest any question, and the result would have been the same as that accomplished by the present judgment.

Relief should not be granted to parties upon appeal in respect of matters about which having the opportunity they have made no complaint below.

Marine Bank *vs.* Fulton Bank, 2 Wall, 252, 258.

FIFTH.—In the case of the verdict of a jury the judgment is entered by the Clerk. No judicial action takes place. But here the Circuit Judge was asked for a decision upon the Referee's Report. If the plaintiff in error intended to complain it was for them to object and except. In this respect the cases essentially differ.

SIXTH.—The judgment should be affirmed with costs.

JNO. E. PARSONS,
for Defendants in Error.

17-629

B

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1016.~~ 666 ~~368~~ 122

HIRAM BARNEY, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

JAMES ISLER, BAPTIST ISLER, AUGUSTUS ISLER, CHARLES ISLER, AND JOHN ISLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

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The stipulation referring the action to Referee Davenport, and the bill of particulars must be treated as having enlarged the claim of the plaintiffs so as *to cover the amount illegally exacted upon the importations* specified.

It is that amount which the Circuit Judge decided that the plaintiffs were entitled to recover.

The plaintiff in error has not brought up the bill of particulars. It was before the Referee and the Circuit Judge. How can error be pleaded if the decision were within the bill of particulars? It was the illegal duty exacted upon the importations there specified, which the stipulation of the parties required the Referee to report, and for which they had in effect agreed that judgment should be taken.

Error is not to be assumed. On the contrary, everything is to be assumed in favor of the decision. In the absence of the bill of particulars, for example, the Court must assume that it gave to the plaintiff in error all requisite information of the amount of the plaintiffs' claim. And the plaintiff in error having made no objection the Court must further assume that he was satisfied of the right of the plaintiffs (the defendants in error) to a decision for the amount reported.

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JNO. E. PARSONS,
for Defendants in Error.

17-629

B

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1016.~~ 666 ~~1~~ 122

HIRAM BARNEY, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

JAMES ISLER, BAPTIST ISLER, AUGUSTUS ISLER, CHARLES ISLER, AND JOHN ISLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 1016.

HIRAM BARNEY, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

JAMES ISLER, BAPTIST ISLER, AUGUSTUS ISLER, CHARLES ISLER, AND JOHN ISLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between James Isler, Baptist Isler, Augustus Isler, Charles Isler, and John Isler, plaintiffs, and Hiram Barney, defendant, a manifest error hath happened, to the great damage of the said Hiram Barney, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-one inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Hiram Barney, plaintiff in error, against James Isler, Baptiste Isler, Augustus Isler, Charles Isler, and John Isler, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said circuit court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this second day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) U. S. Supreme Court. Hiram Barney, plaintiff in error, against James Isler, Baptist Isler, Augustus Isler, Charles Isler, and John Isler, defendants in error. Writ of error. Stewart L. Woodford, att'y for pl'ff in error.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def'ts in Error.

JULY 26th, 1878.

U. S. circuit court. July 26, 1878. John I. Davenport, clerk.

REC. 1016—1

3 U. S. circuit court.

JAMES ISLER ET AL.
vs.
HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the day of April, '68, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs, against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court.

That the defendant afterwards, by his attorney, duly appeared
4 in said action, and such proceedings were thereupon had that afterwards and on the day May, in the year of our Lord one thousand eight hundred and sixty-eight, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided, and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the day of April, one thousand eight hundred and sixty-eight, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of two thousand dollars, lawful money of the United States
5 of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs.

And being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of two thousand
6 dollars of lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant in

the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars; and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

7 And the said defendant, by the U. S. dist. att'y, his attorney, comes and defends the wrong and injury, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c.

And the said parties having stipulated in writing to refer the issue to the Hon. John I. Davenport as referee, and the said referee having heard the respective parties, and made his report, filed February 20th, 1877, in the office of the clerk of this court, by which he found in favor of the plaintiffs for the sum of three hundred and ten & $\frac{30}{100}$ dollars paid as and for duties as of February 14, 1877, and the said parties having stipulated in writing to waive trial by jury and to submit the case to be passed upon by the court without a jury, and the case having been accordingly submitted to the honorable Samuel Blatchford, district judge,

8 he, on the 21st day of February, 1877, did find for the plaintiffs in the sum of one hundred and fifty & $\frac{30}{100}$ dollars in gold and silver coin, and one hundred and sixty & $\frac{05}{100}$ dollars in currency, as and for duties overpaid on charges and commissions, as of February 14th, 1877, over and above their costs and charges by them in their behalf expended, and for those costs and charges now here adjudged the sum of eight-five & $\frac{11}{100}$ dollars.

Therefore it is considered that the said plaintiffs recover against said defendant their damages and costs aforesaid, amounting in the aggregate to the sum of three hundred and ninety-five & $\frac{46}{100}$ dollars.

Judgment signed this 23d day of Feb'y, A. D. 1877.

J. M. DEUEL,
Dep. Clk.

150 30 coin.
160 05 c'y.
85 11

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9 (Endorsed:) U. S. circuit court. James Isler et al. vs. Hiram Barney. Judgment roll. A. W. Griswold, pl'ffs' att'y. Filed Feb'y 22, 1877. Ex'd T.

10 Circuit court of the United States, southern district of New York.

F. Berley *vs.* Augustus Schell.
Same *vs.* Hiram Barney.

E. Blacklowan & al. *vs.* Same.
Thomas N. Dale & al. *vs.* Same.
A. H. Hildick vs. Same.
James Isler & al. *vs.* Same.
E. Kaupe & al. *vs.* Hiram Barney.
C. Le Boutillier & al. *vs.* Same.
A. Rolker & al. *vs.* Same.
Joseph Rosenthal & al. *vs.* Same.
F. Schudardt & al. *vs.* Same.
F. Tomes & al. *vs.* Same.
A. S. Arnson & al. *vs.* Same.
A. Friedman *vs.* Hiram Barney.
11 T. B. Merrick & al. *vs.* Same.
E. A. Oelrichs & al. *vs.* Same.
C. F. Van Blankensteyn & al. *vs.* Same.
A. W. Waterbury & al. *vs.* Same.
John Syz & al. *vs.* Augustus Schell.
J. S. Holden *vs.* H. J. Redfield.
T. Dehon *vs.* H. J. Redfield.
J. H. Abeel & al. *vs.* Same.
L. J Levy & al. *vs.* Same.
Joseph Ellison *vs.* Same.
Wm. H. Horstmann *vs.* Same.
J. W. Schmidt & al. *vs.* Same.
Thomas N. Dale & al. *vs.* Same.
M. S. Whitney *vs.* H. J. Redfield.
Stephen R. Lesher & al. *vs.* Augustus Schell.
E. C. Litchfield *vs.* H. J. Redfield.
12 John W. Schmidt & al. *vs.* Augustus Schell.
J. S. Holden *vs.* Same.
J. S. Holdane & al. *vs.* Same.
T. Dehon *vs.* Same.
Samuel Cochrane & al. *vs.* Augustus Schell.
Thomas N. Dale & al. *vs.* Same.
Joseph Elleson *vs.* Same.
J. H. Abeel & al. *vs.* Same.
J. Gourd & al. *vs.* Same.
L. A. Freund & al. *vs.* Same.
E. C. Litchfield *vs.* Same.
M. S. Whitney *vs.* Augustus Schell.
D. S. Arnold & al. *vs.* Same.
N. Asiel & al. *vs.* Same.
R. Foulds, jr., *vs.* Same.
W. Fuller & al. *vs.* Same.
13 L. E. Amsinck & al. *vs.* Same.
J. S. Burgess & al. *vs.* Same.

C. Augrave *vs.* Augustus Schell.
Edward Armstrong & al. *vs.* Same.
B. F. Babcock & al. *vs.* Same.
H. A. Smythe & al. *vs.* Same.
Geo. T. W. Bartels & al. *vs.* Same.
Edward Bech & al. *vs.* Same.
Geo. F. Bechtel *vs.* Same.
James M. Beebe & al. *vs.* Augustus Schell.
B. A. Mumford & al. *vs.* Same.
G. Wolfers & al. *vs.* Same.
H. D. Henschen & al. *vs.* Same.
James Houldsworth & al. *vs.* Same.
F. Duysters *vs.* Same.
Earl Douglas & al. *vs.* Same.
T. F. Noble *vs.* Augustus Schell.
Geo. L. Newell & al. *vs.* Same.
L. C. Austin & al. *vs.* Same.
Robert Spedding & al. *vs.* Same.
L. Sampson & al. *vs.* Same.
A. Scheitlin *vs.* Same.
D. S. Schauck & al. *vs.* Same.
Henry A. Smythe & al. *vs.* Augustus Schell.
William Thompson & al. *vs.* Same.
John Trippett & al. *vs.* Same.
M. Thalinurge & al. *vs.* Same.
D. A. Lindsay & al. *vs.* Same.
Charles Carville *vs.* Same.
W. S. Toole & al. *vs.* Same.
W. D. Cromwell & al. *vs.* Augustus Schell.
C. R. Cargill & al. *vs.* Same.
15 W. T. Crow & al. *vs.* Same.
H. G. Ely & al. *vs.* Same.
J. Cheney & al. *vs.* Same.
H. Herman & al. *vs.* Same.
L. D. Senat & al. *vs.* Same.
M. H. Swift & al. *vs.* Same.
John Vogt & al. *vs.* Same.
W. S. Wilson & al. *vs.* Same.
William Moser *vs.* Same.
J. C. Morlot & al. *vs.* Same.
T. Le Boutillier & al. *vs.* Same.
S. M. Peyser *vs.* Same.
C. F. Van Blankensteyn & al. *vs.* Same.
W. H. Horstmann & al. *vs.* Hiram Barney.
M. Maas *vs.* Same.
A. Perier & al. *vs.* Same.

16 H. Pastor & al. *vs.* Same.
F. M. Maas & al. *vs.* Same.
O. Priolss & al. vs. Same.
E. B. Strange & al. *vs.* Hiram Barney.
John Bottomly *vs.* Same.
H. Batjer *vs.* Augustus Schell.
A. Rolker & al. *vs.* Same.
George B. Sheldon *vs.* Hiram Barney.
J. M. Pendleton *vs.* Same.
E. B. Strange & al. *vs.* Same.
F. M. Peyser *vs.* Hiram Barney.

17 Upon the orders heretofore made herein referring these actions to Edwards Pierrepont, esq., and upon reading and filing the affidavit of George Bliss, esq., and the stipulation on behalf of the respective parties to the above entitled actions now pending in this court to recover duties alleged to have been illegally exacted upon charges and commissions; it appearing to the court that the assessment of the damages in each of the several causes will require the examination of long accounts, and of numerous invoices, entries, and other documents and papers, and the taking of the testimony of various witnesses touching the same: Now, on motion of George Bliss, esq., counsel for the said several defendants, and Almon W. Griswold and E. Delafield Smith, esqs., of counsel for the said several plaintiffs, appearing and not objecting thereto, it is ordered by the said court now here that the orders heretofore made referring the said several causes to Edwards
18 Pierrepont, esq., be and they are hereby vacated and set aside, and the said causes are hereby referred to John I. Davenport, esq., as the sole referee, to take proofs of and ascertain the claim of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions, which may be found to have been illegally exacted from plaintiffs and paid under protest to defendants, and not barred by the statute of limitations, whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served or to be served in said several causes.

The said referee shall proceed to determine and adjust the claims of the said several plaintiffs in accordance with the rules and decisions of this court in similar cases, so far as the same shall be found applicable to the said causes hereinabove named.

And it is further ordered that said referee state and report the amounts ascertained by him on said several commissions and
19 charges separately, and the facts found by him in respect thereto, and in respect to the protest touching the same.

The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, unless such notice shall be waived by said attorneys, and either party may, on the hearing before said referee, raise objections and exceptions, and the referee shall decide thereon, and either party may bring such objections and exceptions to a hearing before the court after the report of such referee shall be filed, and for that purpose may require the referee to report the evidence or testimony taken in the case upon which the objection or exception arises, in such manner as the court shall direct, and copies of the protests filed therein respectively. That said referee shall report on

such cases with all convenient dispatch; and on the coming in of such report and the decision of such exceptions as may be taken thereto by either party, either party shall be at liberty to move for judgment
20 or verdict for the amount as to the court shall seem meet.

And it is further ordered that the compensation of said referee shall be determined by the court, after the coming in of his said report, at such amount as shall appear to such court to be just and proper.

Dated Dec'r 19, 1876.

(Signed) SAM'L BLATCHFORD.

U. S. circuit court.

F. BERLEY *vs.* AUGUSTUS SCHELL } And 101 other cases against *against* the late collectors of this port.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George Bliss, being sworn, says, that these actions were heretofore referred to Hon. Edwards Pierrepont; that on the appointment of Mr. Pierrepont as Attorney-General, that gentleman notified deponent that he could not further serve as such referee and
21 requested that the order referring the cases to him might be vacated and the same referred to some one else; that deponent promised to procure the making of such an order, but that before he had time to carry out his promise his Secretary of the Treasury stopped all proceedings in this class of actions by directing that the questions involved should be presented to the Supreme Court of the United States; that within a few weeks this direction has been revoked, and deponent has been directed to proceed with the disposition of this class of cases. To that end it is important that a new referee in these cases should be appointed.

(Signed) GEORGE BLISS.

Sworn to before me this 15th Dec'r, 1876.

J. M. DEUEL,
U. S. Com'r S. D. of N. Y.

22 United States circuit court, southern district of New York.

It is stipulated and agreed that the order hereto annexed be entered by and with the consent and direction of the court in each of the above-entitled causes (one hundred and five in all), and that upon the entry of such order the said several causes stand referred to John I. Davenport, esq., for the purposes and in the manner specified in said order.

Dated Dec. 18, 1876.

GEORGE BLISS,
U. S. Attorney, attorney for Defendants in each of said causes.
ALMON W. GRISWOLD,
Attorney for Plaintiffs in certain of said causes.
E. DELAFIELD SMITH,
Attorney for Plaintiffs in certain of said causes.

23 (Endorsed:) U. S. circuit court, southern district of New York. F. Berley vs. Augustus Schell, and 104 other causes. Order of reference, etc. George Bliss, U. S. attorney, attorney for def'ts. Filed Dec'r 19, 1876.

24 Circuit court of the United States for the southern district of New York.

JAMES ISLER ET AL.
vs.
HIRAM BARNEY.

In pursuance of an order made in the above-entitled cause on the 19th day of December, in the year one thousand eight hundred and seventy-six, by which, among other things, it was referred to the undersigned to adjust the amount, if anything, for which the plaintiffs are entitled to a verdict in the cause, and to report thereon to this court with all convenient speed:

Now, I, John I. Davenport, to whom the matter was referred, do report: That I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiffs' claim, and do find that upon the importations specified in the plaintiffs' bill of particulars in the case, the said plaintiffs paid to the defendant, as collector of the port of New York, as and for duties on charges and commissions on said importations, in excess of the amount required by law, the sum of one hundred and fifty-four & $\frac{80}{100}$ dollars in gold and silver coin, or in Treasury notes issued
25 under the authority of the United States, and that said duties were illegally exacted by the defendant from and paid by said plaintiffs to said defendant, under protest duly made by the said plaintiffs in writing, and I do find that the plaintiffs are entitled to a verdict for said sum of one hundred and fifty-four & $\frac{80}{100}$ dollars, as and for duties, and to interest on said sum from the date of its payment to the date of this my report, amounting to one hundred and fifty-five & $\frac{55}{100}$ dollars, amounting in the aggregate to the sum of three hundred and ten & $\frac{35}{100}$ ($310.35) dollars, and that a statement of the said amounts so paid by the said plaintiffs to the said defendants as and for duties on charges, and as and for duties on commissions, together with the interest due thereon, forming part of this my report, is on file in the custom-house.

All of which is respectfully submitted.

Dated New York, February 14th, 1877.

JOHN I. DAVENPORT, *Referee.*

154 80
155 55

$310 35

$23 10

(Endorsed:) U. S. circuit court, southern district of New York. James Isler et al. vs. Hiram Barney. Referee's report. John I. Davenport, referee. Filed Feb'y 20, 1877.

26 U. S. circuit court, southern district of New York.

JAMES ISLER ET AL.
vs.
HIRAM BARNEY.

The parties to the above entitled action hereby waive trial by jury,

and stipulate to submit the case to be passed upon by the court without a jury.

Dated February 19th, 1877.

STEWART L. WOODFORD,
Att'y for Defendant.
ALMON W. GRISWOLD,
Att'y for Plaintiff.

Judgment, if any, to be for—

Gold & silver coin	$150 30
& currency	$160 05
	$310 35

ALMON W. GRISWOLD,
Pl'ffs' Atty.

U. S. circuit court, southern district of New York.

JAMES ISLER ET AL. }
vs. }
HIRAM BARNEY. }

27 On reading the report of the referee in the above entitled action, dated February 14th, 1877, and filed in the office of the clerk of the court February 20th, 1877, and on reading and filing consent of counsel for the respective parties waiving trial by jury, and stipulating to submit the case to be passed upon by the court without a jury, I find for the plaintiffs in the above-entitled cause for the sum of one hundred and fifty & $\frac{30}{100}$ dollars in gold and silver coin, and one hundred and sixty & $\frac{05}{100}$ dollars in currency, paid under protest, as and for duties overpaid on charges and commissions as of February 14th, 1877.

Dated February 21, 1877.

(Signed) SAML. BLATCHFORD.

150 30 coin.
160 05 currency.

310 35 .

(Endorsed:) 324. U. S. circuit court. James Isler et al. vs. Hiram Barney. Consent and finding of court. A. W. Griswold, pl'ffs' att'y. Filed February 23, 1877.

28 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Saturday, the eighth day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Samuel Blatchford, district judge.

JAMES ISLER ET AL. }
vs. } And three other cases.
HIRAM BARNEY. }

On reading and filing notice of motion herein, with admission of service, and affidavit of Frederick W. Brooks, esq., and after hearing Stew-